

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

Gilbert Figueroa,
Plaintiff,
v.
Gill, et al.,
Defendants

Case No.: 2:22-cv-00477-ART-DJA

Order

9 Under 28 U.S.C. § 1915 Plaintiff is proceeding in this action *pro se* and has requested
10 authority to proceed *in forma pauperis*. (ECF No. 8). Plaintiff also submitted a complaint with
11 his initial application, which application was denied without prejudice. (ECF No. 1-1); (ECF
12 No. 5).

I. *In Forma Pauperis* Application

14 Plaintiff filed the affidavit required by § 1915(a). (ECF No. 8). Plaintiff has shown an
15 inability to prepay fees and costs or give security for them. Accordingly, the request to proceed *in*
16 *forma pauperis* will be granted under 28 U.S.C. § 1915(a). The Court will now review Plaintiff's
17 complaint.

II. Screening the Complaint

Upon granting an application to proceed *in forma pauperis*, courts additionally screen the complaint under § 1915(e). Federal courts are given the authority to dismiss a case if the action is legally “frivolous or malicious,” fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). When a court dismisses a complaint under § 1915, the plaintiff should be given leave to amend the complaint with directions as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

27 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a
28 complaint for failure to state a claim upon which relief can be granted. Review under Rule

1 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of Am.*, 232 F.3d
 2 719, 723 (9th Cir. 2000). A properly pled complaint must provide a short and plain statement of
 3 the claim showing that the pleader is entitled to relief. Fed.R.Civ.P. 8(a)(2); *Bell Atlantic Corp.*
 4 *v. Twombly*, 550 U.S. 544, 555 (2007). Although Rule 8 does not require detailed factual
 5 allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the
 6 elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Papasan v.*
 7 *Allain*, 478 U.S. 265, 286 (1986)). The court must accept as true all well-pled factual allegations
 8 contained in the complaint, but the same requirement does not apply to legal conclusions. *Iqbal*,
 9 556 U.S. at 679. Mere recitals of the elements of a cause of action, supported only by conclusory
 10 allegations, do not suffice. *Id.* at 678. Secondly, where the claims in the complaint have not
 11 crossed the line from conceivable to plausible, the complaint should be dismissed. *Twombly*,
 12 550 U.S. at 570. Allegations of a *pro se* complaint are held to less stringent standards than
 13 formal pleadings drafted by lawyers. *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010)
 14 (finding that liberal construction of *pro se* pleadings is required after *Twombly* and *Iqbal*).

15 ***A. First Claim: Violation of the 8th Amendment by LVMPD officers.***

16 Plaintiff alleges that Las Vegas Metropolitan Police Department (LVMPD) officers—
 17 Officer Gill, Sergeant Fletcher, and Sergeant Prettle—violated his Eighth Amendment right to be
 18 free from cruel and unusual punishment when the officers allegedly used excessive force against
 19 Plaintiff. While not specifically alleged in the complaint, it appears that Plaintiff is alleging that
 20 the officers used excessive force during his arrest. Plaintiff asserts that the officers shot him
 21 immediately after he jumped from the second story of a burning building and then detained him.
 22 However, the Eighth Amendment is only implemented post-conviction, when the injury suffered
 23 is “part of the total punishment to which the individual is being subjected for his crime.”
 24 *Ingraham v. Wright*, 430 U.S. 651, 669 (1977). Because the Court believes that the incident
 25 Plaintiff complains of occurred during his initial arrest, his claim does not fall under the Eighth

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1 Amendment. The Court thus dismisses Plaintiff's Eighth Amendment claim without prejudice
2 with leave to amend.¹

B. Second Claim: Violation of the Eighth Amendment and Fourteenth Amendment equal protection clause by the LVMPD.

5 Plaintiff alleges that the LVMPD violated his Fourteenth Amendment equal protection
6 rights by training its employees to use unreasonable force—violating the Eighth Amendment—
7 against individuals with a prior criminal history. Plaintiff alleges that the LVMPD both trained
8 officers to use this force and condoned the use of this force. Plaintiff’s Eighth Amendment claim
9 against the LVMPD fails for the same reason as his Eighth Amendment claim against its officers.

10 Plaintiff's Fourteenth Amendment claim also fails for two reasons: (1) because he alleges
11 incidents that occurred during his arrest, and not while a pre-trial detainee, his claims are more
12 properly brought under the Fourth Amendment; and (2) while Plaintiff appears to be alleging his
13 claim against LVMPD, he does not assert facts to support his allegation that LVMPD had a
14 policy of promoting excessive force.

15 First, Plaintiff's claims are more properly brought under the Fourth Amendment, not the
16 Fourteenth Amendment, because the actions he alleges occurred during his arrest. The Fourth
17 Amendment protections against excessive force apply to the "treatment of an arrestee detained
18 without a warrant up until the time such arrestee is released or found to be legally in custody
19 based upon probable cause for arrest." *Pierce v. Multnomah County, Or.*, 76 F.3d 1032, 1043
20 (9th Cir. 1996). The Fourteenth Amendment due process clause governs the "use of force
21 against a prisoner during the period between arraignment and conviction." *Henderson v. City*
22 *and County of San Francisco*, No. C05-0234-VRW-VAF, 2007WL 2778682, at *1 (N. D. Cal.
23 Sept. 21, 2007).

24 Second, even if Plaintiff did properly allege a Fourth Amendment claim, he has not
25 alleged that *LVMPD* is liable for its officer's actions. A municipality may be held liable for

²⁷ 1 The Court notes that Plaintiff may be attempting to state an excessive force claim under the
Fourth Amendment. The Fourth Amendment requires police officers making an arrest to use only
an amount of force that is objectively reasonable in light of the circumstance as perceived by a
reasonable officer at the scene. *Blankenhorn v. City of Orange*, 485 F.3d 463, 477 (9th Cir. 2007).

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1 constitutional violations under 42 U.S.C. § 1983. Section 1983 creates a path for the private
 2 enforcement of substantive rights created by the Constitution and Federal Statutes. *Graham v.*
 3 *Connor*, 490 U.S. 386, 393–94 (1989). Section 1983 suits against local governments alleging
 4 constitutional rights violations by government officials cannot rely solely on respondeat superior
 5 liability. See *Whitaker v. Garcetti*, 486 F.3d 572, 581 (9th Cir. 2007); see also *Monell v. Dep’t*
 6 *of Soc. Servs.*, 436 U.S. 658, 691 (1978). To bring a § 1983 action against a local government
 7 entity the plaintiff must show “that he was deprived of a constitutional right and the city had a
 8 policy, practice or custom which amounted to ‘deliberate indifference’ to the constitutional right
 9 and was the ‘moving force’ behind the constitutional violation.” *Levine v. City of Alameda*, 525
 10 F. 3d 903, 907 (9th Cir. 2008). However, a plaintiff must allege facts to suggest that the
 11 municipality has a policy that amounts to deliberate indifference. *Avery v. Las Vegas Metro*
 12 *Police Dep’t*, No. 2:16-cv-01774-GMN-GWF, 2018 WL 3972143, at *2 (D. Nev. Aug. 20,
 13 2018). Plaintiff’s claim against LVMPD fails because it does not assert facts suggesting a policy
 14 by the LVMPD. Instead, it alleges conclusions that the LMVPD trained its officers to use
 15 excessive force. The Court thus dismisses Plaintiff’s Fourteenth Amendment claim against the
 16 LVMPD without prejudice and with leave to amend.

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18 **IT IS THEREFORE ORDERED** that Plaintiff’s application to proceed *in forma*
 19 *pauperis* (ECF No. 8) is **granted**. Plaintiff will **not** be required to pay an initial installment fee.
 20 Nevertheless, the full filing fee will still be due, pursuant to 28 U.S.C. § 1915, as amended by the
 21 Prison Litigation Reform Act. The movant herein is permitted to maintain this action to
 22 conclusion without the necessity of prepayment of fees or costs or the giving of security therefor.

23 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. § 1915, as amended by the
 24 Prison Litigation Reform Act, the High Desert State Prison will forward payments from the
 25 account of **Gilbert Figueroa, Inmate No. 1235199**, to the Clerk of the United States District
 26 Court, District of Nevada, 20% of the preceding month’s deposits (in months that the account
 27 exceeds \$10.00) until the full \$350 filing fee has been paid for this action. The Clerk of Court is
 28 kindly directed to send a copy of this order to the Finance Division of the Clerk’s Office. The

1 Clerk of Court is also kindly directed to send a copy of this order to the attention of **Chief of**
2 **Inmate Services for the High Desert State Prison** at PO Box 650, Indian Springs, NV 89070-
3 0650.

4 **IT IS FURTHER ORDERED** that, even if this action is dismissed, or is otherwise
5 unsuccessful, the full filing fee will still be due, pursuant to 28 U.S.C. § 1915, as amended by the
6 Prison Litigation Reform Act.

7 **IT IS FURTHER ORDERED** that Plaintiff's complaint (ECF No. 1-1) is **dismissed**
8 **without prejudice with leave to amend.** The Clerk of Court is kindly directed to file Plaintiff's
9 complaint (ECF No. 1-1) on the docket but shall not issue summons.

10 **IT IS FURTHER ORDERED** Plaintiff will have until **August 17, 2022** to file an
11 amended complaint. If Plaintiff chooses to amend the complaint, Plaintiff is informed that the
12 Court cannot refer to a prior pleading (i.e., the original complaint) to make the amended
13 complaint complete. This is because, generally, an amended complaint supersedes the original
14 complaint. Local Rule 15-1(a) requires that an amended complaint be complete without
15 reference to any prior pleading. Once a plaintiff files an amended complaint, the original
16 complaint no longer serves any function in the case. Therefore, in an amended complaint, as in
17 an original complaint, each claim and the involvement of each Defendant must be sufficiently
18 alleged. **Failure to comply with this order will result in the recommended dismissal of this**
19 **case.**

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22 Dated: July 18, 2022



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24 DANIEL J. ALBRECHTS
25 UNITED STATES MAGISTRATE JUDGE
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